

## ARTICLE

# Imperial Law as Identity Politics: A Subjective Perspective

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Colonial legal historiography takes various forms. Here I concentrate on a less common lens to examine juridical relationships between colonial subjects and their respective normative structures (or, in this case, empire). In this paper, I examine the ubiquitous struggle for and against agency that occurs in non-linear processes of (re)imagining legal codes to show how subjects are situated in relation to various juridical constructs. I argue that this battle over individual or collective agentic status is a result of law's ability to create and to stratify (or, graph) the degree of "personhood" ceded to subjects. This capacity of law can prima facie be seen as impacting two aims of empire, the need to adjudicate difference (and thus define/limit colonial personhood – the local agenda) and the desire to extend imperial influence (the universal agenda). Concentrating on the former, I conclude that the effort to concretize subjective difference in these spaces can be seen as a strategic objective to normalize the space governed. This then necessitates correlative tactical responses by subjects.<sup>1</sup>

**Keywords:** colonialism; legal history; subaltern agency; imperialism; history of empire

## 1 Introduction

Law is perhaps most often analyzed within "top-down" structural perspectives. Examples of hierarchically-based theories concerning the genesis and structure of juridical forms of representation in various contexts are common in the literature.<sup>2</sup> Here, however, I want to invert the perspective to focus on the way imperial legal structures were, and are, *renegotiated* from the standpoint of colonized subjects.<sup>3</sup> Law has the obvious effect of normalizing behavior such that it determines what, and who, is preferred or marginalized (as Michel Foucault and others have been at pains to teach us).<sup>4</sup> Yet can an "on the ground" account of agentic struggle experienced by a colonized subject – one whose behavior is normalized by these systems – provide a more fine-grained interpretation of this relationship?

To phrase this idea another way, is law simpliciter best represented as a set of propositions outlining statutes, rules, or codes of conduct?<sup>5</sup> Or is it, rather, something felt at the point of practical experience as a system of overlapping normative codes specific to a certain context? Or, to put the question in yet another way, does it represent a synthesis of normative pressures and local knowledges within both what "exists" and the accepted ways of apprehending those "realities?" I think that these starting points might not be the most helpful if the goal of our inquiry is to better understand: 1) the project of empire in light of its various legal manifestations,

and 2) the way in which subjects tend to respond to those juridical constructs more generally within their contexts.

These latter, subjective responses to juridical constructs are the concerns taken up here. The resulting analysis will be rooted in the way colonial subjects have tended to respond individually and collectively to imperial legal structures as seen within the various forms those responses have taken. Indeed, subjects appear to be continually involved in a confrontational (i.e., political) conversation about their legal status in virtue of being subjects. This exchange takes different shapes based on specific sets of power relations, but what dynamic do these variances pick out? The dispute is over the characterization of personhood (and not simply legal agency) accorded to colonial subjects by imperial normative systems, as the product of a dialogue involving subjective response.<sup>6</sup> In this paper, I argue that analyzing these exchanges through what I call a "subjective lens" affirms the centrality of personhood in this dispute. Particular imperial contexts provide examples of a dialogue between normative structures and their respective subjects in which colonial personhood became confrontationally negotiated over time, according to the requisite states of affairs in each context.

Michel de Certeau provides an accurate blueprint for outlining the spaces within which this drama takes place.<sup>7</sup> He analyzes spheres of power in his examination of how subjects "live" within them.<sup>8</sup> He subsequently divides the levels

of operational employment of that power into the categories of “strategic” and “tactical.” Only those agents currently holding and wielding political (and thus, normative qua juridical) power can operate at the strategic level. Those with unfettered agency within any such simulacrum have a vested interest in its continued existence and functioning. They are then part of a *strategic* scheme of maneuver (to use military terminology). They operate from the top down.

Those actors restricted by what might be seen as a “scale” of agency cannot deploy the same resources. They are always-already relegated to a different arena in which to maneuver in virtue of their status, which is (re)constructed and perpetuated as a result of strategic normative power. Remaining within a military paradigm, these marginalized populations can only act *tactically*. Their ability to “jockey for position” consists of isolated acts or interventions, conducted individually or collectively, and these tactics make up a peculiar “dance” that seeks to rupture or disturb the status quo. As a result, their vector of striving is from the bottom up. The resources available for this effort thus incur both a penalty and a benefit. On the one hand, the sheer power or scope of achievable interventions available to them are not those of their strategic counterparts. On the other hand, the possible forms they might take seem less restricted.

This is to say simply that the dominant maneuvers of strategy create and perpetuate “the rules.” As subjects practice what de Certeau terms “everyday life,” they live and act at the tactical level. Everyday actions, many of which must skirt the rules in order to “get by,” take the form of tactical interventions within that realm of normative jurisdiction. If extant juridical structures, implemented in support of imperial objectives, are seen as *strategically* working to control the spaces within their jurisdiction, then subjects within those boundaries might be recognized as responding to those strategies with the assets at their disposal. These counters can only be *tactical* in nature, perhaps best described as a type of guerrilla warfare clothed in “normal” quotidian comportment. These tactical responses target the vulnerabilities of empire’s cobbled-together legal edifice, resulting in the intricate dance de Certeau so aptly describes as everyday life.<sup>9</sup> I am fascinated by what this dance strives to accomplish. The cracks and seams that define these “dance floors” illuminate the strategies and tactics deployed to limit or expand subjective agency. This dance seems especially overt in colonial contexts, and my inquiry into these contested spaces clarifies a facet of legal contention perhaps elusive within what I noted as the top-down proposals.

This perspective raises questions on the traditional ascription of causality in these contexts. These are perhaps too easily ceded to the dominant forms of normative power expression, given their more “visible” existence and functioning. I will demonstrate that subjects in these cases are also (perhaps equally) causally efficacious in these ongoing dialogues and confrontations. That this is more difficult to discern is understandable given the tactical nature of their responses. Perhaps hierarchical, simplified notions of cause

and effect do not help what is central within this question: the interplay of deployed strategy (on the part of empire) and tactical response (on the part of the subject) in an effort to more generally limit or expand personhood, respectively.

In the next section, I explain the nature of this struggle in order to show that the subjective perspective deserves more attention. To do this, I will develop theoretical building blocks of the proposal for subsequent clarification. In the following sections, I leverage the resources afforded by this point of view to illuminate how the battle to limit and broaden subaltern agency plays out in five historical examples. I conclude with some thoughts about how this analysis bridges diverse paradigms of structural legal theories.

## 2 The Agentic Argument

To give evidence for my suggestion that general personhood is what is at stake here, note that newly installed European imperial governments debated the ability of indigenes to rationally interact with imposed normative structures. To this end, the concept of a colonial subject’s agency, both individual and/or collective, was central to imperial powers in early disputes about how to apply law in their colonies.<sup>10</sup> I think a banal rendering of legal agency as a general motivator for both imperial legal maneuvering and a subjective response is unsatisfying without further clarification. It is not enough to define the concept in question as the ability to speak, and be heard, before the law or even the ability to self-govern, as I think descriptions of that type turn out to be fairly coarse-grained, offering little amplifying context.

By taking the juridical constructs deployed by various colonial governments into consideration, the idea of legal agency indicates a more holistic constituent of subjective *identity* – that of personhood, broadly construed. Put another way, any imposed legal structure determines the extent to which bodies are regarded “as persons” within its pertinent jurisdiction.<sup>11</sup> It is not *just* the ability to speak and to be heard by the law that is at stake. Rather, the concept determines where an individual or group falls on a “graph of personhood” imposed by a structure that determines a subaltern’s status *as a person*.<sup>12</sup> Colonial subjects were thus engaged in an ontological and epistemological battle for: 1) the conditions of their existence as bodies within their normative qua political constructs (the ontological confrontation), and 2) recognition as erstwhile agents within their respective discursive fields of power (the resultant epistemological question about situating those existences).

To see this, note that subaltern subjects needed classification vis-à-vis their “humanness” with respect to their conquerors. From an imperial perspective, this ontological requirement manifested in efforts to categorize the inhabitants of newly-conquered spaces (which included non-human constituents) as a way to assimilate these existences into a newly-shattered map of “creation.”<sup>13</sup> The subsequent epistemological effort to then parse these existences within

the fabric of empire distributed these subjects into stratified agentic categories, both defining and limiting their personhood, as compared to full metropolitan status. Put more simply, efforts to categorize subalterns sought to give imperial socio-political culture, in the spaces of its domination, meaning. Legal codes and structures provided effective strategic venues for accomplishing both of these tasks in ways that had immediate and enforceable results. They thus created and then adjudicated subjective difference.

In what follows, I argue that the matter of subjective difference is at most only half of the story. To ignore the subjects' tactical responses is to inadequately account for how they fought back to expand their conditions of possibility.<sup>14</sup> The following sections provide examples of how these tactical forays against strategic legal constructs can be seen within collective endeavors referenced to their respective imperial contexts.

To summarize, subjects within any normatively-bounded system are accorded levels of agency by the system itself. From the perspective of the colonial subject, agentic status is determined, or constructed, in relation with juridical codes that shape lived experience. It is not a stretch to claim that these codes preordain the responses of those to whom they pertain.<sup>15</sup> Imperial and subjective confrontation with the agency of the colonized is thoroughly enmeshed within these modes of normative representation, allowing for contingent, co-varying strategies and tactics to play out in a particular setting. These diverse tropes of contention between imperial legal structures and their subjects resulted from the colonizer's tendency to wield legal structures instrumentally in order to construe a colonial subject's personhood as compared against the "bar" of imperial citizenry.<sup>16</sup> Simply stated, imperial legal structures created and then stratified personhood within the spaces of its jurisdiction.<sup>17</sup> This juridical "identity adjudication" resulted in the intentional *and* unintentional responses of colonial subjects to these limitations.

In the following sections, I will demonstrate how battles over identity support my claims. The concept of personhood stratification, as a result of the imperial objective to create difference, can then be deployed more generally. Its applications may range from the perspective of individual legal maneuvering to the international and supranational scales of analysis. I look first at the Indian subjects of New Spain and their response to, and use of, Spanish legal structures. I then turn to the outskirts of the Ottoman Empire, focusing on the city of Aintab. Next, I look at India and the reactions of local litigants to "new" British imperialism and its ostensible emphasis on preserving indigenous codes. I then consider the Parsi community in India, a diasporic minority within an already-subjugated citizenry. I analyze the specific strategies and tactics utilized by actors in each context throughout.

The objective here is to present a working framework of conceptual inquiry that represents a perspective warranting more attention. I aim to defend the joint necessity of subjective and imperial perspectives in order to effectively

trace the contours of this conflict. The resulting analysis demonstrates that the tactical responses of subjects vary in response to opposing, strategic modes of power-cum-legal maneuver.

### 3 New Spain: Legitimization and Assimilation

The personhood of the newly conquered Indians was front and center in 16th century Spanish debates. That their status as fundamentally "rational" persons was contested can be seen in the formal legal dispute between Bartolomé de Las Casas and Juan Gines de Sepúlveda concerning how the Indians were to be classified and treated.<sup>18</sup> Sepúlveda's position can be read as a direct application of Augustinian natural law:

But, for their own welfare, people of this kind are held by natural law to submit to the control of those who are wiser and superior in virtue [...] as are the Spaniards [...] This is the natural order, which the eternal and divine law commands be observed. Therefore, if the Indians, once warned, refuse to obey this legitimate sovereignty, they can be forced to do so for their own welfare [...].<sup>19</sup>

In less strictly legal prose, Francisco de Vitoria famously argued that the newly conquered Indians were capable of rational behavior and self-governance of a sort, yet he also insisted that they were not equal to those championing and proselytizing European-defined natural law.<sup>20</sup> This deficiency, couched in religious terms, required and thus justified the project of Spanish Empire. Put another way, the creation and adjudication of difference, woven into the context of Augustinian natural law, legitimized imperial conquest and governance under the pretext of the well-being of Indians.

While my focus here is less on imperial strategy than on subjective tactics, this scenario highlights the way that Spain framed its strategic narratives, such that: 1) difference was maintained and sharpened, and 2) subjective response was accordingly shaped. The blending of religious "requirement," supported by papal bulls and representing a Roman imperial ethos entailing judgments of agentic difference (following Christian natural law), formed a powerful duet justifying imperial strategy and its legal forms of representation. Thus Pagden:

[...] it was evident that the persistent reliance in circles close to the Castilian court on the papal donation, and its continuing importance in the official historiography of the Spanish Empire, served to keep the continuity between the Spanish monarchy and the ancient and subsequent Christian *Imperium romanum* firmly on the agenda.<sup>21</sup>

Indeed, this legitimizing discourse circumscribed the conditions of possibility, and in the process molded subject-

ive responses to the marginalization experienced under Spanish governance.

As a specific example of how this covariance was instantiated, consider the fact that the Roman mandate provided the rhetoric and operational logic of world domination. This directive required that the King, as Holy Roman Emperor, be both accessible and merciful to his subjects, as both prerogative and obligation contained within the same legitimizing discourse.<sup>22</sup> Imperial law, concretizing the normalizing discourse of empire, was therefore created by royal fiat and flowed from the King directly to his subjects. As a result, Indians came to view the Spanish legal system as a venue in which to appeal to the King directly as imperial subjects.

Note that this indicates an effort by the Indians to limit the power and function of Spanish and indigenous intermediaries. These officials were, in the course of interpreting and enforcing legal codes, effectively (even if not always purposefully) blocking efforts to expand the “voice” of the Indians. Direct appeals to the King, in the form of subjects confirming both his divine and secular right to make law and his obligation to protect his citizenry, continued to increase throughout the seventeenth and eighteenth centuries.<sup>23</sup> The insistence on recognition as imperial subjects, and acting as such, can be interpreted as a maneuver to regain both a sense of self-determinacy (in this case entailing, of course, subjugation) and the ability to act and speak “as a person.” De Certeau also makes note of this phenomenon when discussing subjective tactics used by Amerindians normed by Spanish Empire:

The cautious yet fundamental inversions brought about consumption in other societies have long been studied. Thus the spectacular victory of Spanish colonization over the indigenous Indian cultures was diverted from its intended aims by the use made of it: even when they were subjected, indeed when they accepted their subjection, the Indians often used the laws, practices, and representations that were imposed on them by force or by fascination to ends other than those of their conquerors; they made something else out of them; they subverted them from within—not by rejecting them or by transforming them [...], but by many different ways of using them in the service of rules, customs, or convictions foreign to the colonization which they could not escape.<sup>24</sup>

That the Spanish recognized the resultant need to create the *Juzgado General de Indios* lends credence to this hypothesis.<sup>25</sup> Indeed, Viceroy Lu s de Velasco II called the situation a “crisis of law” requiring a dedicated venue for cases involving Indian suits given: 1) the amount of cases being brought to the *audiencia* through “normal” Spanish channels, and 2) the subsequent difficulties incurred by those Indians while attempting to pursue justice in their respective cases.<sup>26</sup> The new court was seated in Mexico City and

headed by the viceroy who was charged to not only render judgment on purely “Indian cases,” but also to investigate alleged wrongdoing by royal officers. As a result:

The effect of this was to empower Indian claimants to complain not only of *corregidores*’ illicit actions but also their refusal to enforce the law against other Spaniards, [...allowing] Indians to seek refuge in the viceroy’s administrative powers. Indians responded with great enthusiasm, applying for administrative relief, especially decrees of royal protection—*amparos*—in large numbers from the 1590s forward.<sup>27</sup>

While the establishment of a dedicated indigenous venue is certainly understandable from an imperial perspective, seen alternatively through a subjective lens as a uniquely focused Indian court with a direct line of communication to the King and a mode of agentic representation expands Indian personhood. That this tactic (i.e., the willing use of imperial courts) resulted in Indians reinforcing their own domination conditions is perhaps a necessary by-product of both the strategy supported by this particular form of imperial legitimization and the subsequent subjective tactical responses.<sup>28</sup>

This is not to critique the importance of intermediaries, who played a crucial role in the application and availability of imperial justice for Indian subjects.<sup>29</sup> My argument rests on the claim that Indians, given their desire to appeal directly to the King, grasped that their ongoing agentic marginalization went hand-in-hand with the part played by these intermediaries. Their efforts, which required arduous travel commitments and often came at debilitating financial costs, testify to the perception of the *Juzgado* as a direct way to appeal to the King as his subjects, situated within an imperial narrative emphasizing subjects’ access to the Crown as a requirement for identificational status as citizens.<sup>30</sup> Indeed, the phrase “as his subjects” points to that principle by which an Indian, in the role of a litigant claiming the right to “speak to the King,” could imagine herself on something approximating “equal footing” compared to any Spanish subject.<sup>31</sup>

Clearly the modalities of Spanish domination in New Spain informed the responses of Indian subjects. Significantly, their desire and accompanying actions to function as full subjects in response to imperial discourses of legitimization can be interpreted as an agentic struggle to broaden the conception of their personhood. Put differently, they acted intentionally (and tactically, in response to imperial juridical structures as they were strategically implemented and modified) in order to elevate their status as subjects qua persons within this “conversation” which unfolded between colonizer and colonized. The next section takes up the very different historical case of 16th century Aintab, which is located on the borderlands of the Ottoman Empire. Here, the deployment of a new imperial legal code provided a tactical opportunity for subaltern maneuvering.

#### 4 Aintab and Ottoman Legal “Flattening”

The effort to forge an Ottoman imperial identity took a different tack than did the imperial endeavors of Spain. Part of the reason for this might be that there appears to have been less of a need to legitimize imperial rule. From a broadly construed Islamic perspective, the victor in battle seems to have been automatically accorded the legitimacy to rule. Put differently, the need to “Christianize” the natives (and in so doing, justify the presence and methods of imperialism) did not exist, *per se*, for Süleyman and his predecessors in the case of 16th century Aintab. This is not to ignore the numerous sectarian conflicts within that particular religious tradition and historical context. Those certainly existed; however, the exigencies required to “Ottomanize” the empire did not, taken holistically, need to deploy the same kind of legitimizing narrative as did European instances.<sup>32</sup> The primary problem faced by Ottoman emperors was then to “standardize” (or norm) the empire in order to create a cohesive Ottoman identity, which would in turn permit a uniform sense of loyalty among subjects.<sup>33</sup> Süleyman recognized the centrality of legal structures in this endeavor. Pierce offers that:

While Süleyman never gave up his career as a military chief [...], his responsibilities in the arenas of law and religion began to be more conspicuously cultivated in the years around 1540. It is hardly surprising that the sobriquet by which Süleyman became known was *kanuni* – the lawmaker, the legally minded regulator.<sup>34</sup>

The panoply of legal choices and forms of appeal or recourse in Aintab was impressive.<sup>35</sup> Various jurisdictional “carvings” within Islamic culture provided a dizzying array of options for the prospective litigant in order to include those of different faiths. It is no surprise that litigants appealed to the jurisdiction most likely to afford the broadest autonomy and/or chance of success. Even more interesting is what Pierce explains as occurring over the course of a year during which a new imperial judge arrived in Aintab, likely carrying Süleyman’s new book of *kanun* common law.<sup>36</sup> During the investigation of three prominent cases (and glossing over the community’s response to and use of the imperial court), Pierce argues that the citizens of Aintab increasingly turned to this venue when pursuing legal objectives. This was in part due to the new law book’s jurisdictional scope considered in light of ongoing Ottoman efforts to disseminate a characterization of imperial culture and the new judge’s seeming willingness to grant a public voice to larger segments of society, including marginalized groups, resulting in their use of the court to their advantage.<sup>37</sup>

I want to explore two dynamics within this scenario. First an initiative to standardize, and thus flatten, the legal landscape seems clear, especially considering Süleyman’s intense focus on Ottoman legal codes, including his own contributing authorship. If we grant that the primary strategic (i.e., imperial) problem was one of forging a common identity for

the empire and its citizens, a standardized legal framework could contribute to this end. The resultant blending of legal code standardization and identity politics, as represented within Ottoman politico-normative initiatives, provides a lens to examine how that phenomenon impacted concepts of personhood over and above a simple legal definition. The imposition of a uniform identity limited subjects’ ability to self-individuate in everyday life. A more fine-grained analysis reveals how that identity was parsed and enforced.

The second dynamic regards the citizens of Aintab, who took note of the fact that the new law book extended *kanun* law’s jurisdiction to cases previously located within local and customary venues. Perhaps more significant is the matter that marginalized populations, on being offered a public opportunity to express their interests “for the record” before the new judge, took advantage of this capacity: they brought forth a greater number of grievances before this court. This occurred even when a marginalized litigant had little chance for success, suggesting that the subject’s primary motives for taking a case to court were not necessarily legal ones.<sup>38</sup> These motions toward litigation might be characterized as tactical responses exploiting an opportunity presented by the new law book, the court, and the new judge within which even marginalized litigants could “punch above their weight.” As Pierce puts it:

Users of the court and their witnesses necessarily chose their words carefully. But particularly in matters where honor was at stake, they were mindful that another audience was listening, one that would make its own judgment independent of the court, since the latter’s rules sometimes led to punishment and pardon that went against intuitive local readings of justice. The community [...] might grant a kind of social absolution that the judge could or would not. Hence we find women frequently making theater in the venue of the court and playing to an audience made up of the larger community.<sup>39</sup>

The court, in other words, was a stage on which subjects defended their communal personhood. It is for this reason that subjects used the court to have their voices heard with no hope of winning.<sup>40</sup> The new judge allowed this, even permitting, in at least one very visible case, the female litigant to have the “last word” for the record.<sup>41</sup> The judge had already ruled against her, so the goal in this case was not to win, but to protect her reputation in the community. The court thus represented an arena in which to contend for one’s personhood, before imperial officials *and* the community.

Ottoman legal structures clearly constituted a battleground on which personhood was contested. The form these took in Aintab influenced the ways in which subjects exploited them in order to protect and/or broaden their status *as persons* within that community. It is then not surprising that the more overt examples of these tactics are found in the responses of marginalized populations. In

Aintab, an initiative to standardize imperial identity by flattening Ottoman legal codes created new opportunities for citizens to exploit. The shape their actions took shed light on obtaining forms of normative imperial representation, both for colonized and colonizing actors. How these representations interacted in praxis gives these expressions a granularity that is only achieved by considering the tropes of subjective, agentic struggle.

### 5 Autonomy, Family, and Private Property in Western India

Shifting to a later, perhaps less nakedly “militaristic” example in the case of British Empire in Western India, we should note the change in legal discursive formations from earlier cases. Here, the aim of imperial governance was to recognize indigenous legal structures, at least in a minimal sense, while retaining a “veto” capacity for imperial jurists acting in an appellate role. As Rachel Sturman notes, “In India the claim that the colonial rulers were simply respecting and enforcing existing indigenous laws was crucial to the legitimacy of the state throughout the era of colonial rule.”<sup>42</sup> The rules of the game, and their discourses of legitimization, had changed on the surface while remaining fundamentally the same. The fact that imperial officials reserved the right to overrule local judgements reinforced the strategic narrative of British superiority.<sup>43</sup> This framework provides yet another example in which subjective maneuvering exposes a subaltern struggle for personhood, especially prominent within familial contexts and including cases relevant to gender inequalities existing within Indian culture and which were expressed juridically.

Britain created a self-legitimizing description of its empire as enforcing local custom and regional law on behalf of their colonial subjects.<sup>44</sup> I want to focus not on this alleged imperial necessity, but on how its practical ramifications played out in the eyes of Western Indian subjects, especially including women and lower caste individuals. It is possible that the British Empire intended to do nothing more than enforce local law in the societal areas it impacted most directly, such as family, property, and religion.<sup>45</sup> What happened on the ground was less straightforward. British officials found themselves embroiled in the difficult practice of interpreting shades of difference in the codes of various locales and attempting to discern the “best” way of interpreting them in a given situation.<sup>46</sup>

This effort was especially contested when the case involved familial relationships and bequeathed property, extending to the characterization of certain persons as property to include wives.<sup>47</sup> The extant conflation of personal status and its associated ability to make or contest property claims (and their legal equivalences) appears to have spurred British officials to interject British precepts into appellate judgements (and thus into precedent) such that property law, in Western India, evolved from intended imperial support of local law to a process involving a pluralistic blending of imperial and indigenous codes.

Given the argument, one might expect that women, accorded a lesser degree of personhood in local legal constructs, would eagerly seize opportunities afforded by this intrusion of imperial law. This is precisely what occurred, even though their appeals to the Bombay High Court were not guaranteed to be successful.<sup>48</sup> Those previously favored by customary legal entities, such as those males within higher caste classifications, would naturally defend previously extant codes and their associated precedents in order to maintain their privilege.

Put another way, *any* subject can be expected to interact with the legal forms of representation that normalize behavior and relational status in the way that most effectively manipulates them to her advantage as a subject, that is: as an agent qua *person* defined within a normative structure. Facing a layering of diverse codes within an ongoing legal dialectic about their status, subjects understandably chose the version of legal representation which offered the best characterization of their personhood, not just abstractly before the law, but more tangibly as represented within familial relationships defining position and recognition within them.<sup>49</sup> Sturman articulates it this way:

[My] article takes up the question of how [...] states have defined the privacy of property(ies), and the *public equivalence of individuals*. [...] My central claim is two-fold: first, that intimate property arrangements and disputes within families formed a key site for *colonial formulations of legal subjecthood*.... It traces how the colonial courts in this region reshaped the particular intimate practices of material and symbolic obligation, repayment, barter, and circulation that the state would enforce.<sup>50</sup>

That Britain continued to reinforce difference on the part of India’s citizenry is beyond question. However, during the time period under consideration, British codes offered a different and qualitatively more substantial characterization of personhood to certain marginalized populations.<sup>51</sup> The fact that individuals within those populations recognized opportunities to have those characterizations “legalized” within precedent supports the claim that a subjective perspective on the legal constructions of personhood, referenced to differing contexts, is necessary in order to better understand the ongoing process of legal dialogue between normative and subjective forms of representation. As a final example, I now turn to a minority community within a colonized citizenry and its collective response in defense of a highly prized identity.

### 6 David and Goliath

The previous examples have concentrated on relatively binary arenas of theoretical and practical dialogue. Specifically, they operate in the context of the roles of colonizer and colonized. The Parsi community, quite differently, provides an example of a minority, immigrant population

within an already-subjugated colonial citizenry.<sup>52</sup> As such, they have remained on the margins by virtue of the limited political and cultural representations afforded them. These representations have been determined by either colonial power structures or by the majority population, rendering the Parsis an always-already subaltern class of actors in this particular context. Their situation as the “third party” within imperial legal discourse provided the Parsis with a unique opportunity to act both collectively and “offensively” in order to sustain their own cultural and politico-religious norms. They accomplished this by inhabiting, and then controlling, the ways in which they interacted with imperial juridical structures.

In Western India, a layering of ever-more-increasingly intrusive British legal codes, which overlapped local and regional statutes, formed the basis of agentic dialogue between colonizer and colonized.<sup>53</sup> The Parsis, however, were characterized by Britain as not possessing an indigenous legal structure or set of juridical norms. Thus it was difficult for imperial initiatives to situate them within their discursive formulations of empire in a neat way, such as to force them to conform to the legitimizing, multivalent legal conversations being held with all aspects of India’s citizenry.<sup>54</sup>

Also important here is the intensely self-valued, insular nature of Parsi identity.<sup>55</sup> This resulted in imperial and host nation populations having little knowledge of their internal legal behavior. The resulting confusion in how to treat the Parsis exposed a crucial vulnerability in the British legal edifice: that of its own exploitation from within in order to protect Parsi values from within the legal profession.

By mobilizing a collective response — namely, an invasion of Parsi citizenry into British law schools and courts — the Parsis were able to divert attention from and forestall intervention into their self-proclaimed identity and standards of self-governance. Their response thoroughly saturated the British legal system.<sup>56</sup> The following clarifies the fact that this was the impact of legal impositions on Parsi subjective agency:

...their [Parsis] mastery of the form of Anglo legalism enabled them to evacuate its contents. [...] Parsi lobbyists, legislators, lawyers, judges, jurists, and litigants de-Anglicized the law that controlled them *by sinking deep into the colonial legal system itself*. [...] This legal know-how enabled them to create pockets of autonomy right at the heart of state legal institutions. [...] In short, the Parsis worked from within and through the colonial state, rather than from outside or against it. [...] The vision that ultimately captured the power of state law entailed not only a particular picture of the Parsi family, but also a notion of Persianness legitimated through eugenics-inspired claims to racial purity. Law also circled back to shape Parsi identity [...] Thus, *influence between law and identity flowed in both directions*.<sup>57</sup>

*En masse*, the Parsis committed to becoming legally educated. They served as lawyers, judges, assistants, and paralegal personnel. Parsis also used the British court system at a rate far exceeding that of any other population.<sup>58</sup> Vastly outnumbered and “out-gunned” as a minority population, they were nevertheless able to control the spaces of imperial normative governance. In the process, they protected their communal identity from imperial intrusion.

Protecting one’s identity is just another way of maintaining the capacity to autonomously self-determine collective personhood status. The way that the Parsis responded to their situation as a “third party” showcases the agency they exercised to both determine and protect their communal autonomy, and by extension, the personhood status of individuals. Seen from the perspectives of strategy and tactics within normative power structures, their decision to infiltrate the imperial legal system turned out to be both innovative and representative of the subaltern agency within all these empirical examples of marginalized maneuvering. The Parsis’ tactical response is not found in the motives underlying them. It is, rather, the collective nature of their infiltration into the legal landscape that distinguishes the Parsis’ endeavors to sustain their cultural identity.

## 7 Conclusion

I began this essay by suggesting that an inverted lens into imperial legal contexts might provide greater granularity as to how these impacted their respective subject populations, especially with regard to the agency afforded them. The perhaps default view by which legal agency is an apparatus for determining who can speak before the law fails to fully illuminate what is at stake in these “conversations.” This perspective turns out to highlight much more than any legally-restricted characterization. A larger confrontation exists in these juridical dialogues, one concerning subjective agency, considered more broadly. These battles feature two primary types of maneuvering: 1) strategic initiatives, available only to prevailing normative power structures and aimed at creating and reinforcing difference, and 2) tactical responses, leveraged by subjects in order to challenge those strategic moves. To illustrate this, I explored four historical cases of juridical negotiations between imperial legal structures and the populations subject to them.

In all of these examples, subaltern citizens took the initiative to tactically counter their marginalization by imperial legal initiatives (to include a specific implementation of these latter by intermediaries). The Indians of New Spain, recognizing an opportunity afforded them by virtue of the King’s role as Holy Roman Emperor (and required comportment vis-à-vis his subjects), overwhelmed colonial legal structures with suits aimed at both countering oppressive intermediaries while striving to establish their status as full Spanish subjects. Marginalized groups in and around Aintab, especially women, took advantage of the legally-flattened landscape created by Süleyman’s new law book in order to speak before a broader audience, even if there was no chance

of “winning” their respective cases. In Western India, familial property cases indicated the ways in which litigants maneuvered to find the venue most sympathetic to their claims and to take advantage of imperial legal jurists’ powers to expand their agency within Indian culture. Finally, the Parsi population, recognizing a seam within which they had “disappeared” from Britains’ legal lens, took the initiative to appropriate the British legal system by finding a way to both expand their status within the empire as well as protect a highly-valued, insular identity. In each of these scenarios, tactical, on-the-ground responses to the strategic landscape played a pivotal role in renegotiating their colonial, marginalized identities. In the face of normalizing pressure which sought to undermine their agency, they found ways to assert their agentic dignity through creative use and/or renegotiation of the very structures oppressing them.

This interplay between imperial juridical strategies and opposing subaltern tactics, I suggest, should be extended to include the analysis of normative structures of socio-political power, writ large. Contrasting privileged groups’ realm of strategic maneuver with the tactics of their colonized counterparts sheds light on both the boundaries and characterization of their instantiations and intents, all the while highlighting their respective practices to pursue or to marginalize individual and collective adjudications of identity, broadly construed. This has the potential to significantly broaden the pragmatic and disciplinary findings in such analyses, resulting in proposals for remedying the oppressive effects of those power structures through a more nuanced and holistic set of contours.

To provide an example of how this broadened perspective of inquiry can be further developed, recall that several paradigmatic approaches to legal analysis were mentioned in the introduction. Each of these can certainly be applied to different contexts and their requisite juridical structures by using a disciplinarily-bounded lens of legal analysis. That they can each be so validated remains significant, yet the nature of subjective response to imperial legal systems as I have explained it here illuminates a *common* methodology and analytical lens for *all* such instantiations of normative “personhood (de)construction.” As such a uniquely fruitful mine is unearthed in which to look for descriptive (perhaps even predictive) gems across various fields of theoretical and practical inquiry, blurring disciplinary boundaries and offering new and fascinating ways to situate the proposals in question.

This perspective also problematizes any predilection to cede causal valences and vectors to dominant power structures too readily in the context of socio-political normative theory. This is because subjects in these cases have been shown to be actors in a much richer sense of the word. Specific instantiations of empire and their respective subjects engaged in a dialogue whereby colonial personhood transformed into something “worked out” over time and in accordance with various states of affairs. A traditional, linear accounting of cause and effect becomes merely orthogonal to what I claim is of primary importance – that of

seeing the creation and evolution of legal discourse as a process of deployed strategy and countering tactics played out between ruler and subject, between a desire to define and limit personhood and an opposing effort to protect, broaden, and defend it.

## Notes

<sup>1</sup> I would like to thank Danna Agmon, Mauro Caraccioli, Patrick Salmons, Robert Hodges, Leigh McKagen, Allie Briggs, Katherine Dague, Sarah Plummer, and several anonymous referees for insightful critique of earlier drafts. Note that the argumentative gloss concerning the dual, somewhat conflicting, efforts entailed in “being empire” takes its inspiration from Ibhawoh (8–19 as one example) and his exegesis of supranational British juridical structures as they functioned in a broadly construed African context. The impetus for my construction of agentic stratification comes from Bishara (66–79) and his discussion of legal-cum-economic relationships, and their evidentiary documents known as *waraqas*, as playing a crucial role in the “inventing of personhood” within the Western Indian Ocean network of trading partners.

<sup>2</sup> For an example of legal propositional analysis, see Dworkin’s (1982) defense of an aesthetic treatment of these as the “best” interpretation; for an argument proposing a pluralistic layering of juridical structures functioning within colonial and metropolitan spaces, see Benton (2002); for an account of legal “evolution” represented by secular legal authorities “filling in the gaps” resulting from religious and cultural formulations, see Ross (2015); for a theory of law as local knowledge represented within cultural ontologies and their associated epistemologies, see Geertz (1983). The questions of the subsequent paragraph are derived from (some of) these proposals. My purpose here is not to question these theories or their efficacy within legal analysis. In fact, seen through the lens of legal “personhood-making” that I will use here, each has something valuable to offer when applied to different contexts.

<sup>3</sup> I will use the term “subjective” here according to its less common, late middle English formulation meaning “of the subject.” Thus the “subjective perspective” refers to the perspective (performative, aesthetic, and normative) of the (in this case, subaltern) subject.

<sup>4</sup> See Foucault (1972) and de Certeau (1984) for two representative accounts following this general description.

<sup>5</sup> To include, as an obvious example, tenets of criminal and civil case law. This seems to restrict legal analysis to an impoverished set of referents. Juridical structures did, and do, more than simply define and adjudicate instances of crime or civil dispute. What is at stake thus encompasses more than merely legal agency. More below. See also Shadle (2006, especially chapters 3 and 5) for another example of how juridical and social mores constructed and perpetuated a characterization of personhood referenced to the ability to pay bridewealth (and thus legally marry). Fascinatingly, a Gusii male or

female was not considered an adult unless married, and marriage was only available to those able to pay the going “rate” decided by local elders and communicated within customary law (7–12).

- <sup>6</sup> As Bishara puts it on page 66: “Fundamentally at play were ideas about an actor’s legal personhood – their capacity to bear rights and obligations within a world of contracting that demanded it. For jurists, [...] personhood and the capacity to incur obligations were inseparable [...] jurists and other juridical actors made it clear that if some actors were born with a wide capacity, or a full legal personhood, others were not.”
- <sup>7</sup> De Certeau, 29–42 and 77–90, which he calls “Story Time.”
- <sup>8</sup> De Certeau, 34–39, 67–68, 91–110. I find it particularly interesting that he points out how “everyday” know-how *precedes* theory. Theoretical inquiry must “look into” (*voir*) and “contemplate” (*theōrein*) what people do. This foreknowledge comprises the resources for “stories” – outlining performative tactics or “know-how” (*savoir-faire*). Thanks to an anonymous referee for encouraging me to amplify my situation of de Certeau’s theory here.
- <sup>9</sup> Positions taken by Benton (2002), Burbank and Cooper (2013), Geertz (2000), and Ross (2015) all support this vague “cobbled together” description. I will not argue for or against any way in which these theories were or are instantiated in any context. In fact, I think the contingent (and thus variable) forms that differing instantiations of imperial juridical constructs have structurally taken are supported to varying degrees and in various instances by each of them.
- <sup>10</sup> See, for example, Bartolomé de Las Casas and Juan Gines de Sepúlveda’s exchange on this topic within Las Casas (1992) and Sepúlveda (1984), both of which outline their contrasting positions regarding Indian agency as argued in the well-known 1550–1551 court debate at Valladolid. See also Coates’ (17) summary of Francisco de Vitoria’s (1539) treatise on the ability of the conquered Indians of New Spain to (rationally) govern themselves.
- <sup>11</sup> This objective, in turn, limits the forms imperial (legal and other) strategies can take such that it remains empire. Note the apparently conflicting goals of universalization of culture/power structures while simultaneously adjudicating (and thus maintaining) difference.
- <sup>12</sup> I owe this “graph of personhood” formulation to Danna Agmon. Note that this is more than a simple picture referencing levels of personhood. If I am right, the very target of imperial legal strategies was to create and adjudicate difference (on the part of colonial subjects) such that colonial identity became ontologically distinct from “full personhood” as represented by imperial citizenry. This is what is being referred to as a “graph of personhood” (see also endnote 17). Bishara (66–80) outlines a contextually situated example of this phenomenon that supports my intuitions. Significantly, this account explores the concept of “vicarious personhood” as pertaining to various marginalized subjects. See also Peirce (2003) and Sharafi (2014) for accounts that hinge on interpreting imperial legal structures through a subjective lens such that those structures (and their objectives) are clarified. These will be explored in more detail below.
- <sup>13</sup> See Caraccioli (2018) for an account of how this ontological assimilation (and its follow-on epistemological emplacement) functioned as a result of Spanish missionaries’ efforts to catalogue New Spain’s culture and natural flora/fauna/animal life.
- <sup>14</sup> Thanks to an anonymous reviewer for urging me to clarify this point.
- <sup>15</sup> As another way to illustrate this, consider that Newton’s Third Law is at least as useful to scientific (and other) theories in its inverted formulation. General inquiry concerning the relationships between actions and reactions have increasingly tended to focus on the explanatory power reactions have when attempting to clarify the nature of the precipitating action. I think an analogous approach is fruitful in this context.
- <sup>16</sup> This conceptual comparison between “imperial” citizen and colonial subject simply illustrates how imperial legal structures created difference and, in the process, initial-ized and sustained disparate classifications of personhood. It is not meant as an attempt to define or analyze the controversial concept of “citizenship” writ large.
- <sup>17</sup> By “stratify,” I mean the limitation of subjective personhood on a scale of reference that uses, as counterweight and apex, metropolitan citizenship (to include racial homogeneity). I also want to leverage the geological sense of the word, in that stratification implies a solidification of position such that subjects are defined and referenced by their place in the (socio-political) strata normatively, which both adjudicated difference and universalized empire.
- <sup>18</sup> Bartolomé de Las Casas, *In Defense of the Indians* (1992 translation). The preliminaries of this document clarify Sepúlveda’s position as well. See also Sepúlveda (1984 trans.). See also Owensby (134–135) for a characterization of Sepúlveda’s argument championing “natural slavery.”
- <sup>19</sup> *Ibid.*
- <sup>20</sup> Coates (17) and Owensby (16, 91–92, 134) provide a summation of de Vitoria’s arguments supporting the Indian’s right to retain ownership of the land “God has given them.” For the original text, see Vitoria (1539: 1967 translation).
- <sup>21</sup> Pagden (32). Italics in original. See also *Ibid.*, 39–52 for how these foundations were supported and challenged both internally to, and externally from, Spain. Of interest is also Ross’ (2015, 816–824) discussion of the debate concerning how law (specifically or generally) bound conscience as legitimized by its genesis within natural-cum-Christian law.
- <sup>22</sup> *Ibid.*, 11–28.
- <sup>23</sup> Owensby, 32–48. This is his first articulation of this phenomenon. It is repeated elsewhere. That he sees these efforts as a battle for personhood is equally clear: “-these

leaders, appealing to the mercy and prudence of a distant king, harbored a hope that the law might be made an instrument of their survival and agency..." (47).

<sup>24</sup> De Certeau, 31–32.

<sup>25</sup> Owensby 43–47.

<sup>26</sup> *Ibid.*, 42–43.

<sup>27</sup> *Ibid.*, 44. The majority of this relief would have been from intermediaries holding local or regional positions of power.

<sup>28</sup> As Spanish Empire matured, Indian litigants aggressively pursued any legal seam through which their recognition as full persons could be achieved. See Twinam (2015) for a case of just such an opportunity and response. See also Mumford (2008) for responses by colonized and colonizer alike in the context of late Spanish Empire. Note that whatever form imperial strategy took, subjects responded in ways that leveraged legal systems to improve their status as recognized subjects (i.e., persons). The apex of this conflict is highlighted by Premo (2017). She suggests that litigants, pressing for their own, expressly human, rights (contrasted with constructs based on natural law), *created* the Enlightenment in the colonies.

<sup>29</sup> See Owensby (8–9) for introductory thoughts concerning how intermediaries affected the legal process on behalf of, or in opposition to, Indian litigants.

<sup>30</sup> In 1588, José de Acosta insisted that, "the multitude of Indians and Spaniards form one and the same political community, and not two entities distinct from one another. They all have the same king, are subject to the same laws, are judged by a sole judiciary. There are not different laws for some and for others, but the same for all." Owensby (48) notes that this is self-congratulatory and perhaps unrealistic, given the ways in which the Spanish colonial legal system adjudicated colonial difference. Acosta's words are from his *De procuranda indorum salute*, Madrid: CSIC, 1984–1987 [1588], 516.

<sup>31</sup> Note that the Spanish word for "subject" in this case is *sujeto*, for which the primary adjectival meanings include "fastened", "fixed", and "secure." Coupling these with the implied "contingent upon" predicate yields a profound way in which to describe Indian conceptualization (in the language of their conquerors) of what it was to be the King's subject.

<sup>32</sup> See Pierce (253–258) for an example of Islamic sectarian conflict affecting legal states of affairs in Aintab. These tensions granted, it is clear that Islamic conquest of previously Islamic polities did not require the same discourses of legitimization to support the new regime when contrasted with Eurocentric empire.

<sup>33</sup> *Ibid.*, 285–287, 389. For an example of how this project of legal homogenization was implemented, see 356–361 for Pierce's analysis of the ways in which Süleyman's new *kanunname* treated *zina* (sexual crimes). In brief, the new law book relaxed the burden of proof incurred by charges of *zina* such that they: 1) expanded the opportunity for these cases to be heard (instead of being bracketed within "family law"), and 2) in so doing, provided a public

forum in which marginalized citizens (especially women) were permitted a public voice (where before this was usually not the case). Social justice implications aside, this represents just one area in which the Ottoman Empire expanded its legal influence to move issues formerly sequestered within family or "small-scale" jurisdictions to imperial courts. This is fascinating as conjecture about any empire's legal motivations qua agenda. It is plausible that would-be imperial power structures need some degree of standardization (ontologically and epistemologically) for the formation and implementation of their normative strategies to count as a candidate for "being empire." Perhaps Süleyman recognized this as affecting his executive power quotients, especially in remote provinces, prompting both his exhaustive *kanunname* and the appointment of new provincial judges.

<sup>34</sup> *Ibid.*, 108.

<sup>35</sup> *Ibid.*, 123–124. This is one of many places in which Pierce outlines a myriad of "problem solving" venues within Aintab.

<sup>36</sup> *Ibid.*, 108–109, 285–287.

<sup>37</sup> *Ibid.*, 356–361, 375–389. Note that this is her primary argument. Pierce convincingly parses the available evidence concerning the new judge's arrival and citizens' responses in order to paint a picture of how the judge's implementation of the new *kanun* code affected life in Aintab. She also chronicles Süleyman's activity within this project of legal standardization, situating his efforts within a broader imperial context of solidifying authority and quelling rebellious factions.

<sup>38</sup> *Ibid.*, 351–356. This is one example among many Pierce offers suggesting that a primary reason for someone to appeal to the Ottoman court was to protect or recapture community reputation (as constitutive within communal identity).

<sup>39</sup> *Ibid.*, 203. "Women," in this case, could also be extended to other marginalized populations, to include minority religious groups.

<sup>40</sup> *Ibid.* Pierce suggests that women sometimes broke the law intentionally in order to speak to the community in front of the court. A specific example is that of the litigant Hadice Bilal in the same passage, who chose to travel to Aintab from Aleppo in order to address the community there, as the man with whom she was involved was a citizen of Aintab. See also "Fatma's Story" (351–374) for another example.

<sup>41</sup> *Ibid.*, 251–275.

<sup>42</sup> Sturman, 614.

<sup>43</sup> This is also illustrated by Ibhawoh, to include its theoretical inconsistencies. See his 2013 (37–51, 102–105).

<sup>44</sup> See Sturman (614–616) for the structural and dialectical intricacies of Britain's role within local legal venues.

<sup>45</sup> *Ibid.*

<sup>46</sup> This can be read as a give-and-take between the theoretical "categorizing" perspectives of legal analysis offered by Dworkin (1982) and Geertz (2000). British officials debated the relative merits of interpretational formu-

lations of legal codes (to include efforts to determine authorial intent) against local custom in the form of local knowledge and application. This latter blending of legal and anthropological epistemologies carried the day, at least as to how Britain intended to handle indigenous law. What occurred, according to Sturman (620–636), was the perceived need by imperial legal officers to introduce tenets of British law, as decided within the Bombay High Court, into Indigenous law as tie-breakers in difficult situations (and to counter “repugnant” local customs; see also Ibhawoh (52–86) for a similar scenario in a British-African supranational context). As a result, overlapping layers of imperial and indigenous law became increasingly standardized as precedential, a phenomenon paradigmatically proposed by Benton (2002).

<sup>47</sup> Sturman, 631–633.

<sup>48</sup> *Ibid.*, 619–631.

<sup>49</sup> See *Ibid.*, 619–623, for a case discussing joint property rights within a family context (including adopted heirs). This example turned on relationships and statuses within the family defined by Indigenous codes and contested within the colonial court system. Notably, some of the variables centered on the relationship between past property owned in conjunction with future obligations to family members. As such, the case was as much about personal relationships as it was about the property involved. For another case demonstrating how currently privileged actors used the courts to their advantage see *ibid.*, 633–636. Here the actions of a father to provide a posthumous gift to a care-giving daughter was overturned within a Hindu court, importantly reinforcing personhood differences between males and females. It is crucial to note that the litigants (the sons) leveraged the venue most likely to maintain that difference. While the case nominally concerned property, it effectively adjudicated agentic gradients.

<sup>50</sup> *Ibid.*, 611–613. Emphases mine.

<sup>51</sup> British legal codes emphasized communities (or labels, such as “wife,” “mother,” etc.) in their definitions and respective statutes; however, as Sturman demonstrates (*Ibid.*, 633–636), individuals within those groups systematically leveraged the opportunities afforded by these characterizations to their advantage in court. This tendency seems expected given my claim that legal venues are arenas within which identity politics occur.

<sup>52</sup> In the context of Bombay, although it also applies to the Parsi diaspora generally. See Sharafi (19–23, 239–273) for examples not confined to this specific location. Still, the majority of Parsis settled in the Bombay region of Western India, and this is where Sharafi focuses her attention.

<sup>53</sup> As outlined in the previous section.

<sup>54</sup> *Ibid.*, 2, 24–26, 72. According to Sharafi, this was how the Parsis wanted it. They saw imperial legal institutions as a means of protection for both for their identity and ability to thrive.

<sup>55</sup> This self-protective nature can be seen in the ways Parsis appropriated and allocated material and cultural resources. There is an affinity to the Jewish diaspora in this context. This is noted by Sharafi (118–119 as one example) in order to highlight similarities as to how diasporic minorities interact with majority legal structures. The parallels involving legal relationships and how they deal with highly insular diasporas deserve greater attention. I cannot do that here, yet I offer as food for thought the widespread difficulty of governing polities to historically “situate” identity and citizenry status in the case of Jewish diaspora (as one example). Their putative insularity might preclude an easy resolution of those questions, and it has resulted in similar ways in which they have been both characterized and marginalized. Note that both Jews and Parsis found ways in which to infiltrate and dominate a particular segment of society. The difference between them (as in the different ways they were/are viewed by “host” societies) is perhaps related to the respective segments of society infiltrated.

<sup>56</sup> Sharafi 5–7, 37–83.

<sup>57</sup> *Ibid.*, 5–6, final emphasis mine.

<sup>58</sup> *Ibid.*, 6, 38.

### Competing Interests

The author has no competing interests to declare.

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